Presby Homes and Services v. WCAB (Quiah),
No. 978 C.D. 2009 (Pa. Cmwlth. Nov. 5, 2009)

Facts: Claimant's injury was accepted initially via a Notice of Temporary Compensation Payable, but, within the 90 day period, the employer issued a Medical-Only NCP and a Notice Stopping, denying disability on the basis that she was capable of modified duty, but did not return to work in a modified position offered to her by the employer. Thereafter, claimant filed a Claim Petition. Job offer was described as a "temporary modified duty position," and included a four-page "receipt and acknowledgement" section which indicated the offer did not constitute a "promise of employment" or a "contract for employment" and further indicated the job duties, tasks, work hours, and work requirements may be changed at any time. Claimant did not respond to the job offer. The WCJ granted the Claim and held the job offer invalid because the modified position was "at will" and the duties could be revised by the employer. Therefore, the job did not "actually exist" and was not "bona fide."

Issue: Whether an employer's job offer is a bona fide offer where the employer reserves the right to revise the duties of the job and offer the job "at will."

Holding: The employer did, in fact, establish that it demonstrated a modified duty position was actually available to its partially disabled employee. Pennsylvania is an "at will" employment state, and the right to change claimant's job duties did not negate the modified offer. If, in the future, the employer imposed duties on claimant that exceeded her restrictions, she would be able to file a Petition to Reinstate disability benefits.

Giant Eagle, Inc. v. WCAB (Givner),
No. 813 C.D. 2009 (Pa. Cmwlth. November 18, 2009)

Facts: Claimant's injuries were initially accepted, and during the litigation of a Modification Petition based upon a specific job offer, the WCJ ordered the claimant to undergo an IME. Claimant failed to attend, and the employer filed a Suspension Petition. The WCJ granted the Suspension and suspended only her wage loss benefits as of the date of the IME and ongoing until she submitted to the exam. Employer appealed requesting suspension of medical benefits and wage loss benefits during this time period under Section 314(a) of the Act.

Issue: Whether claimant is entitled to medical benefits for the time claimant did not attend her WCJ ordered physical examination.

Holding: The issue of whether medical benefits are "compensation" under Section 314(a) is a matter of first impression. A footnote in O'Brien v. WCAB (Montefiore Hosp.), 690 A.2d 1262 (Pa. Cmwlth. 1997) set forth that, in cases where the employer's liability has already been determined, "medical expenses and compensation are considered to be separate'." Therefore, in this case, only indemnity benefits could be suspended. However, the court stated that, based upon Section 314(a), the WCJ may, at his or her discretion suspend wage and medical benefits. The WCJ must expressly state that he or she is suspending both; otherwise, the presumption is that only wage loss will be suspended.

Anthony Bentley v. WCAB (Pittsburgh Board of Education),
No. 1560 C.D. 2008 (Pa. Cmwlth. November 18, 2009)

Facts: Claimant underwent an FCE on January 22, 2003 showing he could return to work light-duty. His physician issued a report on January 30, 2003 agreeing with the release. The adjuster testified that she issued the NARTW after receiving the January 30, 2003 note, or "shortly after" she received the FCE. Also, the vocational expert's Labor Market Survey report indicates that the NARTW was sent after the FCE, and testified that it was included in the referral file from defendant which she received between March 3 and March 14, 2003.

Issue: Whether the employer "promptly" provided claimant with a Notice of Ability to Return to Work.

Holding: The WCJ's finding that the NARTW was sent to claimant "no later than the vocational interview" was adequate to meet defendant's burden of establishing "prompt" issuance of the notice.

Leisure Line, et al. v. WCAB (Walker),
No. 2174 C.D. 2008 (Pa. Cmwlth November 18, 2009)

Facts: Claimant's Claim Petition alleged injury to low back "in a motor vehicle accident in course and scope of employment" but recited no factual allegations to support this conclusory statement. Claimant was, in fact, on his way to work, when the accident occurred. At the last hearing, claimant testified that he drove his personal vehicle from his home in Wilmington, Delaware to the employer's bus yard in Coatesville, Pennsylvania. Claimant testified that he was paid a daily rate of $128.50, which had been established in a collective bargaining agreement between his union, Teamsters Local 35, the employer. The Coatesville round trip run took approximately 12 hours to complete but could take longer, depending on the weather and traffic congestion. Claimant was paid a flat $128.50 regardless of the number of hours he worked on a particular day driving the Coatesville run. Claimant conceded that the collective bargaining agreement did not provide a specific dollar amount of compensation for his commute to and from Coatesville. Nevertheless, he asserted that his commuting time was "factored into" his daily wage. Claimant also explained that "any driver that did that particular run would get" $128.50 per day. The wage of $128.50 was purposely high, according to Claimant, to entice drivers to do the Coatesville run; otherwise, few drivers would take on the assignment.

The WCJ granted the claim petition. The WCJ credited Claimant's testimony that the collective bargaining contract compensated Claimant for his travel to and from the Coatesville bus yard. The Board affirmed the WCJ's determination that Claimant was injured in the course and scope of his employment but on different grounds. The Board concluded that Claimant was furthering his employer's business during his commute by driving a less popular run.

Issue: Whether the claimant's testimony credited by the WCJ that his commuting time was "factored into" his daily wage, which was "purposely high" in order to entice drivers to do the Coatesville run satisfied the "employment contract" or "special circumstances" exceptions to the going and coming rule.

Holding: Neither exception applied in this case, and the decisions of the WCJ and Board were reversed.

Employment Contract

In order to satisfy the employment contract exception to the coming and going rule, a claimant must satisfy two elements. First, the claimant must prove that a travel allowance is related to the actual expense and time involved in the claimant's commute. Second, the claimant must prove that the employer provided or controlled the means of the commute.

Claimant did neither. Claimant did not testify that the collective bargaining agreement provided him a travel allowance that was commensurate with the distance of his particular commute or his expenses. To the contrary, Claimant testified that every driver who took the Coatesville run was paid the same per diem wage of $128.50, no matter how long the run took and no matter where the driver lived. Likewise, Claimant did not testify that Employer provided or controlled the means of transportation for his commute between Wilmington and Coatesville. Claimant drove his own personal vehicle. Accordingly, Claimant did not meet his burden of proving the employment contract exception to the coming and going rule.

Special Circumstances

The special circumstances entitling an employee to benefits for injuries sustained during a commute must involve an act "in which the employee was engaged … by order of the employer, express or implied, and not simply for the convenience of the employee." In a general sense it is always in the employer's interest that employees come to work, particularly if some circumstances of the job, such as its duties or location, make it unattractive. This interest, far from being a special circumstance, is a universal one.

There is no exception to the coming and going rule for the employee injured while commuting to an unattractive job or location. Rather, the employee must be acting under orders of the employer for the commuting injury to be work-related. Claimant's testimony did not establish a special circumstances exception to the coming and going rule.